9-44.000
HEALTH CARE FRAUD

9-44.100 Health Care Fraud -- Generally

Health care fraud is a growing problem across the United States. In response to this growing problem, in 1993, the Attorney General made health care fraud one of the Department's top priorities. Through increased resources, focused investigative strategies and better coordination among law enforcement, the Department continues to upgrade its efforts in combatting the full array of fraud perpetrated by health care providers.

Health care fraud can be prosecuted both civilly and criminally under a variety of statutes and regulations that are discussed in several different chapters of the United States Attorneys' Manual including 9-42.000 (Fraud Against the Government), 9-43.000 (Mail and Wire Fraud), and 9-46.000 (Program Fraud and Bribery).

See the Criminal Resource Manual at 976 for additional background on the problem of health care fraud.

9-44.150 Fraud and Abuse Control Program and Joint Guidelines Mandated by the Health Insurance Portability and Accountability Act of 1996

The Health Insurance Portability and Accountability Act, signed by the President on August 21, 1996, established and funds a Health Care Fraud and Abuse Program to combat fraud and abuse committed against all health plans, both public and private. See the Criminal Resource Manual at 978 for the text of the Program.

In addition, joint Guidelines issued by the Attorney General and the Secretary of the Department of Health and Human Services to carry out the Fraud and Abuse Program stress the importance of communication and shared information between private and public plans and the federal, state and local governments. The Guidelines also note the importance of parallel or joint proceedings to help maximize the government's recovery while minimizing duplication of effort. See the Criminal Resource Manual at 978 for the text of the guidelines.

9-44.160 Guidelines for Multidistrict Health Care Fraud Initiatives

The following guidelines for multidistrict health care fraud initiatives were issued by the Attorney General on April 2, 1997:

I. *COORDINATION OF ACTIVITIES.*

The United States Attorneys' Offices, the Criminal Division and the Civil Division should work as partners to ensure a vigorous national health care fraud enforcement program. As the Health Care Fraud and Abuse Guidelines promulgated by the Attorney General and the Secretary of the Department of Health and Human Services recognized, consistent with the Department's regulations, the United States Attorneys' Offices remain the focal point for the coordination of criminal and civil health care fraud sanctions within a district. *See* the Criminal Resource Manual at 978 (Health Care Fraud and Abuse Guidelines).

The purpose of this memorandum is to provide guidance to the United States Attorneys, the Criminal Division, and the Civil Division, in carrying out their responsibilities in the investigation and prosecution of multidistrict health care fraud matters in a manner that (1) encourages initiative on the part of individual United States Attorneys and draws upon their litigation expertise and knowledge of the local community; and (2) utilizes the expertise and institutional and program knowledge of the Criminal and Civil Divisions, in particular the Fraud Section and Asset Forfeiture and Money Laundering Section of the Criminal Division, and the Commercial Litigation Branch of the Civil Division.

Cooperation and communication among components will enhance health care fraud enforcement. Before the Civil Division or Criminal Division acts on any health care fraud matter within a particular district, or a United States Attorney's Office acts on a health care fraud matter in a district other than its own, it shall advise in advance the health care fraud coordinator in the United States Attorney's Office of that district. Similarly, United States Attorneys' Offices shall advise the Criminal Division's Fraud Section and the Civil Division's Commercial Litigation Branch of matters which appear likely to result in inquiries to the Criminal or Civil Divisions.

II. *IDENTIFYING MULTIPLE INVESTIGATIONS.*

Each investigative agency will be responsible for ascertaining whether a subject of an investigation is already under investigation by any other agency and/or in multiple jurisdictions. Investigative and prosecutive agencies must be alert to and appropriately communicate fraud schemes and health care enforcement policy issues that potentially require a nationwide strategy.

III. *INVESTIGATIONS IN MULTIPLE DISTRICTS.*

When a federal or state investigative agency, a United States Attorney's Office or the Department of Justice ascertains that a subject is under investigation in multiple jurisdictions (whether by one or multiple agencies), they should convey that information to the relevant investigative agencies and the Criminal and/or Civil Divisions of the Department of Justice and the appropriate United States Attorneys' Offices so that, where appropriate, they can develop together a nationwide strategy to most effectively coordinate the multiple efforts and efficiently use resources. Where the subject operates only in one state or in one metropolitan area, communication to the relevant United States Attorneys is sufficient. In other instances of multiple investigations of the same subject, the U.S. Attorney's Office must notify, as early as possible, the Criminal and/or Civil Divisions and relevant investigative agencies by letter or electronic mail of the multiple investigations and the following information:

A. the identity of the subjects of the investigation;

B. a summary of the factual allegations to be investigated; and

C. a preliminary assessment of the statutes which may have been violated.

IV. *NATIONAL INITIATIVES.*

Where an investigative agency, a United States Attorney's Office, the Civil Division or Criminal Division of the Department of Justice seeks to develop a health care fraud national initiative which would target a common fraudulent scheme perpetrated in a like manner by multiple similarly situated subjects (i.e., particular health care providers) in multiple districts, then they should convey that information to the relevant investigative agencies, the Criminal Division and Civil Division and the appropriate United States Attorneys' Offices so that together

they can develop a nationwide strategy to most effectively coordinate the multiple efforts and efficiently use resources. Recent examples of health care fraud national initiatives which would have fallen into this category include: Labscam; hospital laboratory project initiated in Ohio; and the lymphedema pump initiative.

V. *RELEVANT FACTORS FOR CONSIDERATION IN DETERMINING PROTOCOL FOR SPECIFIC INVESTIGATIONS/INITIATIVES.*

Within one week of receiving notice that a matter constitutes a multidistrict investigation or a national initiative as set forth respectively in III or IV above, the relevant components and investigative agencies will discuss and determine together the appropriate method of pursuing the multidistrict investigation or national initiative including the extent and manner of the coordinating role, if needed, of the Civil Division and/or Criminal Division. Until coordination is determined, the relevant United States Attorneys' Offices, investigative agencies and, where appropriate, the Criminal and/or Civil Division should pursue the investigation in a manner which will not interfere with or compromise investigations in other districts. Relevant factors for this discussion may include but not necessarily be limited to the following factors:

a) nature of the scheme and investigation and its relation to the district;

b) the status of any criminal investigation;

c) traditional False Claims Act venue factors, including where any qui tam cases may have been filed;

d) resource and expertise of relevant districts;

e) need for consistency and coordination.

VI. *COORDINATION OF MULTIDISTRICT INVESTIGATION/NATIONAL INITIATIVE.*

In devising the appropriate method of coordinating the multidistrict investigation or national initiative, the relevant components will ensure that the coordinating office or offices (whether a U.S. Attorney's Office, Civil Division or Criminal Division) perform the following responsibilities and communicate with other affected offices:

A. Notification of and coordination with other offices of the Department of Justice as appropriate, such as the Associate Attorney General's office, the Deputy Attorney General's office and other offices, Boards and Divisions, as appropriate.

B. Notification of and coordination with the appropriate headquarters officials of the affected federal agencies to ensure that agency policy concerns are respected.

C. Providing assistance in securing and coordinating sufficient investigative and audit resources to appropriately handle the matter.

D. Calling for and organizing strategy and training sessions or meetings that promote the efficient handling of the matter.

E. Providing assistance in the coordination of discovery requests and responses to discovery affecting multi-district and/or nationwide cases.

F. Assisting in the establishment of any necessary data bases and ensuring that compatible forms of Automated Litigation Support, to the extent appropriate, are available.

G. Ensuring consistency to the extent possible in making decisions about initiating actions, which legal theories are to be applied, evaluation of proposed settlements and trial strategies.

VII. *GLOBAL SETTLEMENT*

In the event that a federal multidistrict investigation is leading to a global settlement, all relevant parties, including appropriate state and local agencies should be informed of negotiations at the earliest possible date so that the appropriate entities, such as National Association of Medicaid Fraud Control Units, can designate a team

of representatives to negotiate on their behalf. Similarly, in the event that a state-led multidistrict investigation results in a global settlement, similar early communication should occur. All global health care fraud settlement must be conducted and completed in accordance with existing Department of Justice procedures concerning such settlements.

VIII. *EVALUATION OF THESE GUIDELINES.*

These guidelines will be revisited by April 1998.

Approved,
Attorney General Janet Reno
April 2, 1997

9-44.200 Overview of Authorized Investigative Demands -- Authority

On August 21, 1996, the President signed into law the Health Insurance Portability & Accountability Act, P.L. 104-191. Section 248 of P.L. 104-191 adds a new statute, 18 U.S.C. § 3486. This provision empowers the Attorney General, or the Attorney General's designee, to issue investigative demands to obtain records for investigations relating to Federal criminal health care fraud offenses; these records are not subject to the constraints applicable to grand jury matters set forth in Fed. R. Crim. P. 6(e). The new statute also provides for judicial enforcement of these investigative demands through contempt actions and immunizes persons complying in good faith with such demands from civil liability for disclosure of information. Investigative demands differ from inspector general subpoenas in that the scope of the latter are limited to the statutory authority of the specific inspector general and civil investigations, whereas investigative demands can be directed more broadly to various public and private victims and must involve criminal investigations.

9-44.201 Overview of Authorized Investigative Demands -- Delegation

The Attorney General's authority to issue investigative demands pursuant to 18 U.S.C. § 3486 has been delegated, with authority to redelegate, to the following officials:

1. Each United States Attorney;
2. The Assistant Attorney General for the Criminal Division.

9-44.202 Overview of Authorized Investigative Demands -- Limitations

Authorized investigative demands can be an important source of evidence. Issuance of these demands and access to records obtained pursuant to them, however, must be in accord with a number of legal requirements. This section presents an overview of several specific statutory requirements set forth in 18 U.S.C. § 3486; the statutory language should also be reviewed prior to issuance of an investigative demand to ensure compliance with the more routine provisions.

1. Subject Matter Limitation

Pursuant to 18 U.S.C. § 3486, the use of authorized investigative demands is limited to investigations relating to "Federal health care offenses." The term "Federal health care offense" is defined in 18 U.S.C. § 24(a) to mean a violation of, or a criminal conspiracy to violate, 18 U.S.C. §§ 669, 1035, 1347, or 1518; and 18 U.S.C. §§ 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 if the violation or conspiracy relates to a health care benefit program. The term "health care benefit program" is defined in 18 U.S.C. § 24(b) as any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

2. Geographic Limitation on Document Return

Pursuant to 18 U.S.C. § 3486, the site designated for the production of the records requested pursuant to an authorized investigative demand must be not more than 500 miles from the place where the authorized investigative demand was served.

3. Limitation on Return Date

Pursuant to 18 U.S.C. § 3486, an authorized investigative demand is required to prescribe a return date that allows a reasonable period of time within which the objects can be assembled and made available. Unlike a forthwith subpoena, an investigative demand may not require the immediate production of records at the time it is served.

4. Authority to Compel Testimony Limited

Authorized investigative demands may be used to require the production of records, including books, papers, documents, electronic media, or other objects or tangible things. Pursuant to 18 U.S.C. § 3486, the authority to issue investigative demands to obtain testimony is limited to requiring a custodian of records to give testimony concerning the production and authentication of such records.

5. Restrictions on Individual Health Care Information

Pursuant to 18 U.S.C. § 3486, health information about an individual acquired through an authorized investigative demand may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed *against* that individual unless the action or investigation arises out of and is directly related to receipt of health care, payment for health care, or action involving a fraudulent claim related to health. Any other use requires a court order upon a showing of good cause. In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. In granting such an order, the court shall impose appropriate safeguards against unauthorized disclosure.

6. Limitation on Use After Indictment

After an indictment has been issued, authorized investigative demands may continue to be used in furtherance of an ongoing investigation, provided they are not directed to a defendant. *Cf. United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993), *cert. denied*, 510 U.S. 119 (1994); *United States v. Harrington*, 761 F.2d 1482, 1485 (11th Cir. 1985) (administrative subpoenas issued by Drug Enforcement Administration between indictment and trial held legal when issued to third parties during continuing investigation).

9-44.203 Factors to Consider Prior to Issuance of Authorized Investigative Demands

The following factors should be considered prior to the issuance of an authorized investigative demand:

1. Whether the background of the criminal investigation for which the records are being subpoenaed relates to any act or activity involving a Federal health care offense (as defined in 18 U.S.C. § 24(a)) as required by 18 U.S.C. § 3486.

2. Whether appropriate consideration has been given to the manner in which to enforce the investigative demand in the event of noncompliance.

9-44.204 Authorized Investigative Demands -- Record Keeping Procedures

In light of the fact that the authorized investigative demand is a new enforcement tool, it is anticipated that its use will be closely tracked. In order to enable the Department to reply quickly to inquiries concerning the use

of investigative demands, each United States Attorney's office and the Fraud Section of the Criminal Division should maintain records on the following:

1. the number of authorized investigative demands issued and the dates of service;

2. office procedures for the issuance of, and compliance with, authorized investigative demands;

3. whether any health information obtained pursuant to authorized investigative demands was used in, or disclosed in, any administrative, civil or criminal action or investigation directed against the individual who is the subject of the information;

4. whether the investigative demand required testimony from a custodian of records;

5. whether documents were returned pursuant to the authorized investigative demand without judicial enforcement;

6. whether judicial enforcement of the investigative demand was pursued and the result of that litigation.

The specific manner in which this information is maintained is left to the discretion of each United States Attorney's office and the Fraud Section of the Criminal Division. The challenge for each office is to develop an accurate record keeping system without creating extensive administrative obstacles which render the authorized investigative demand too cumbersome to use.